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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 536

SANTA CRUZ FRUIT PACKING COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof

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SANTA CRUZ FRUIT PACKING COMPANY, a corporation,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Santa Cruz Fruit Packing Company, a corporation, prays that a writ of certiorari issue to review a decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on July 31, 1937 (R. 138), granting a petition by the National Labor Relations Board for the enforcement of its order against Santa Cruz Fruit Packing Company.

OPINIONS BELOW

The findings of fact and order of the National Labor Relations Board (R. 55-83), and the opinions of the Circuit Court of Appeals (R. 104-137), have not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals for the Ninth Circuit was entered on July 31, 1937 (R. 138-141). The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and section 10(e) of the National Labor Relations Act (49 Stat. 449).

QUESTIONS PRESENTED

1. Whether petitioner was subject to the jurisdiction of the National Labor Relations Board because of labor practices affecting its employees engaged in labeling, packing, storing and loading canned goods.

2. Whether certain labor practices committed by petitioner had, or tended to have, any effect upon interstate and foreign commerce within the meaning of sections 2 and 10(e) of the National Labor Relations Act (49 Stat. 449) so as to bring petitioner within the jurisdiction of the National Labor Relations Board.

STATUTE INVOLVED

The National Labor Relations Act (49 Stat. 449) is printed as an appendix hereto, and the Court is respectfully referred to it.

STATEMENT

On September 27, 1935, a charge was filed against petitioner with the National Labor Relations Board for the Twentieth Region on behalf of Weighers, Warehousemen and Cereal Workers, Local, 38-44, International Longshoremen's Association (R. 1). A complaint and notice of hearing were issued by the Regional Director on November 2, 1935 (R. 5, 13), and the Board designated a Trial Examiner (R. 14). Petitioner filed an answer to the complaint on November 8, 1935 (R. 14). An amended complaint (R. 20) and new notice of hearing were filed November 14, 1935. The amended complaint charged petitioner with the commission of certain unfair labor practices affecting commerce, under section 8, subdivisions (1) and (3) and section 2, subdivisions (6) and (7) of the National Labor Relations Act (49 Stat. 449).

The answer was stipulated to serve as an answer to the amended complaint (R. 32). A hearing was had before a Trial Examiner commencing on December 23rd and running, with continuances, to January 6, 1936 (R. 32). Petitioner moved to dismiss upon the grounds of unconstitutionality of the Act and lack of jurisdiction, and the motions were denied (R. 33).

Following the hearing the motions were renewed and were subsequently denied (R. 33). An intermediate report and conclusions were filed by the Examiner on January 30, 1936, and petitioner thereupon excepted (R. 48). Decision, findings of fact, conclusions of law and an order by the Board followed on April 2, 1936 (R. 55-84).

On January 12, 1937, pursuant to an application for leave, the Board petitioned the Circuit Court of Appeals for the Ninth Circuit for an order enforcing its order (R. 93), and on July 31, 1937, the Court granted the Board's application and made its decree (R. 138).

The following facts may be summarized from the Board's findings:

Petitioner, Santa Cruz Fruit Packing Company, is a California corporation, one of the four or five largest of its kind in the State, operating two canneries in California, where it is engaged in canning, packing, warehousing and shipping fruits and vegetables (R. 60). Petitioner's 1935 pack, including a small carryover, was 1,699,270 cases. Thirty-nine per cent of this was sold to customers in foreign countries and other states under F.O.B. and C.I.F. San Francisco Bay point contracts (R. 61). None of petitioner's supplies came from interstate sources, and it operates no plant out of California. In the summer of 1935 certain warehouse employees joined the union which later filed the charge against petitioner, and the labor practices ensued which are here involved. Since petitioner does not challenge the Board's findings as to

these practices, they will not be discussed further. The only issues raised here go to the Board's jurisdiction.

The warehousemen were engaged in performing various duties at the cannery; they labeled cans, they packed them in cartons, stored them in the warehouse portion of the cannery, and helped load trucks or freight cars, some of which had destinations out of California (R. 152-153). As a result of the labor practices, picket lines were established at the cannery; the goods were declared "hot cargo" and other unions refused to handle them. This refusal was a violation of the award made in October, 1934, by Judge Sloss acting as Federal arbiter following the San Francisco maritime strike of that year (R. 196-197), and was participated in by persons not involved in the labor practices.

On the basis of these facts the Board made its order, and the Circuit Court of Appeals for the Ninth Circuit, upon petition of the respondent Board, made a decree enforcing the order of the Board against petitioner (R. 138). The Circuit Court of Appeals, upon the transcript of the proceedings before the Board, held that Article I, section 8 of the Constitution conferred upon Congress the power to regulate petitioner's labor relations with respect to all employees engaged in production, upon the authority of *National Labor Relations Board v. Jones & Laughlin Steel Co.*, 301 U. S. ....., 81 L. Ed. 563, and upon the further proposition that the *Jones & Laughlin* case overruled the decision of this Court in *Carter v. Carter Coal Co.*,

298 U. S. 238, 80 L. Ed. 1160 (R. 108-111). Judge Denman, in his opinion, stated that the *Carter* case was identical with petitioner's (R. 109). The opinion further holds that the congressional power exists where only thirty-nine per cent of the product ultimately entered interstate commerce and all raw materials were produced within the state (R. 116). Upon these two propositions petitioner was held to be subject to the National Labor Relations Act.

Judge Haney filed a concurring opinion in which he held that the Board would have had jurisdiction over petitioner if only one per cent of its product had ultimately gone into interstate commerce (R. 120-121).

Judge Wilbur dissented upon the ground that there was not a sufficient portion of petitioner's product in interstate commerce to confer jurisdiction upon the respondent Board (R. 121-137).

The decree upon petition for enforcement of the Board's order was entered July 31, 1937 (R. 141).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that petitioner was subject to the jurisdiction of the National Labor Relations Board because of its labor relations with certain production employees.

2. In holding that the unfair labor practices which were found to have been committed by petitioner af-

fected, or tended to affect, commerce within the meaning of section 2 of the National Labor Relations Act.

REASONS FOR GRANTING THE WRIT

1. The questions presented in the instant case are of the utmost public importance and have not yet been passed upon by this Court.

The Circuit Court of Appeals held that petitioner, as to its production employees, was subject to the National Labor Relations Board's jurisdiction, upon the ground that unfair labor practices affected commerce. Only thirty-nine per cent of petitioner's product and none of its supplies touched channels of interstate commerce. The National Labor Relations Act is an attempt by Congress to regulate a phase of a relationship which until 1935 had, generally speaking, been left without legislative control. Under this Act the jurisdiction of the National Labor Relations Board is determined by the application of the Commerce clause (*Constitution,* Art. I, sec. 8) to an employer's business. If the business affects interstate commerce, the National Labor Relations Act may be applied to his labor relations; otherwise, these relations must be governed by whatever state regulations may exist.

In five decisions of this Court the applicability of the National Labor Relations Act to production employees has been passed upon. (*National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 U. S. ....., 81 L. Ed. 563, 57 S. Ct. 615; *National Labor Relations Board v. Fruehauf Trailer Co.,* 301

U. S. ....., 81 L. Ed. 582, 57 S. Ct. 642; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. ....., 81 L. Ed. 585, 57 S. Ct. 645; *Associated Press v. National Labor Relations Board*, 301 U. S. ....., 81 L. Ed. 603, 57 S. Ct. 650; *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, decided April 12, 1937, 301 U. S. ....., 81 L. Ed. 601, 57 S. Ct. 648.) In each of these decisions the Court has found that the constitutional requirements necessary to confer jurisdiction upon the Board existed, but there was in each of them a dominance of interstate activity which is lacking in the case at bar. In this respect petitioner believes that it speaks for a large percentage, if not a majority, of the substantial businesses and industries of the country—its organization is upon a purely local basis without regard to the ultimate destination of the product, and intrastate activity is the dominant characteristic. Within this group fall a large number of western canneries, employing thousands of persons and having a yearly production of millions of dollars. No decision has been rendered by this Court upon the applicability of the Act to such production employees. The desirability of removing uncertainty as to the status of such employees is clear, from the standpoint of both employer and employee and the National Labor Relations Board itself.

Several writers have expressed doubt as to the status of industries such as petitioner's under the Act. Professor Magruder, in 50 Harvard Law Review, at pp. 1095-1096, says:

> "At the other end of the line, consider a big retail business, a department store, for example,

that obtains most of its merchandise from out of the state, and sells it locally, in the main, though conducting perhaps a small mail order business. A general strike by the clerks of the department stores of any large city might well dam up the flow of an important volume of interstate commerce. The case is doubtful. The Court recognizes that 'the question is necessarily one of degree'. A stronger case for federal regulation would be a big chain store system.

"There is much room for speculation. The Court has shown that it will pay attention to relevant economic data, which the board makes a part of its administrative record, showing that particular activities have a practical and substantial effect upon interstate commerce. However, the Court has warned that the argument must not become so fine spun as effectually to obliterate the distinction between what is national and what is local 'and create a completely centralized government'. A strike in the barber shops might interrupt the flow of hair tonic in interstate commerce. But the Board need not concern itself with subtle arguments for an extension of its jurisdiction."

See, also,

25 *California Law Review,* pp. 601-603.

2. The Circuit Court of Appeals has rendered its decision in a way which probably conflicts with other decisions of this Court.

Judge Denman and Judge Haney base their opinions upon the express proposition that the decision of this Court in *Carter v. Carter Coal Co.,* 298 U. S. 238, 80 L. Ed. 1160 (which they concede would otherwise be

controlling) was impliedly overruled by the decision in *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 U. S. ....., 81 L. Ed. 563, 57 S. Ct. 615.

3. The Circuit Court of Appeals, in holding that the acts of third persons in declaring petitioner's product "hot cargo" and refusing to handle it, in violation of the award of a Federal arbiter, gave the Board jurisdiction, decided an important question of Federal law not yet determined by this Court.

Petitioner believes that Congress did not intend to subject employers to the penalties provided by the Act, where the only effect of labor practices upon interstate commerce is brought about by the wrongful interference of third persons (R. 196-197).

For these reasons it is respectfully submitted that this petition should be granted.

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SANTA CRUZ FRUIT PACKING COMPANY, a corporation,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF FOR PETITIONER

OPINIONS BELOW

A decision (R. 55) was rendered by the Board, which included findings of fact (R. 60), conclusions of law (R. 79) and an order (R. 80). This was rendered on April 2, 1936.

In the Circuit Court of Appeals (Circuit Judges Wilbur, Denman and Haney) an opinion was written by Judge Denman and filed on July 31, 1937. It appears on page 104 of the record. A concurring opinion was filed on the same day by Judge Haney. It appears on page 117 of the record. A dissenting opinion was filed on the same day by Judge Wilbur. It appears on page 121 of the record.

JURISDICTION

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §347), pursuant to the authority of section 10(e) of the National Labor Relations Act (49 Stat. 449). The judgment of the Circuit Court of Appeals was entered on July 31, 1937. A rehearing was not requested.

QUESTIONS PRESENTED

1. Whether petitioner is subject to the jurisdiction of the National Labor Relations Board because of labor practices affecting employees engaged in labeling, packing, storing and loading petitioner's canned goods.

2. Whether certain labor practices of petitioner had, or tended to have, an effect upon interstate and foreign commerce within the meaning of sections 2 and 10(e) of the National Labor Relations Act (49 Stat. 449) so as to bring petitioner within the jurisdiction of the National Labor Relations Board.

STATUTE INVOLVED

The National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449; U. S. C. Sup. I, Title 29, Sec. 151 et seq.) is printed as an appendix hereto, and the Court is respectfully referred to it.

STATEMENT

The facts are stated in the petition, pages 3 to 6. Petitioner desires to emphasize the fact that all of its raw materials and supplies were derived from intrastate sources, and that of all its product, only about thirty-nine per cent found its way into interstate or foreign commerce. All of this thirty-nine per cent was sold under F.O.B. or C.I.F. San Francisco Bay point contracts. Petitioner further emphasizes that the effect upon shipments through branding its goods as "hot cargo" and the consequent refusal of other unions to handle them was the result of the acts of third persons in violation of an award of a Federal arbiter. There was no stoppage of normal operations at the cannery of petitioner.

ARGUMENT

Following the recent decision of this Court in *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* decided April 12, 1937 (301 U. S. ....., 81 L. Ed. 563, 57 S. Ct. 615) and companion cases (*National Labor Relations Board v. Friedman-Harry Marks Clothing Company,* 301 U. S. ....., 81 L. Ed. 585, 57 S. Ct. 645; *National Labor Relations Board v. Fruehauf Trailer Company,* 301 U. S. ....., 81 L. Ed. 582, 57 S. Ct. 642; *Washington, Virginia & Maryland Coach Company v. National Labor Relations Board,* 301 U. S. ....., 81 L. Ed. 601, 57 S. Ct. 648; *Associated Press v. National Labor Relations Board,* 301 U. S. ....., 81 L. Ed. 603, 57 S. Ct. 650, all decided April 12,

1937) the validity of the National Labor Relations Act as an exercise of congressional power over interstate commerce is not disputed. The Act, however, is a departure from the traditional fields of Federal regulation, and to the extent that it is applied to spheres hitherto not affected by control of the national government, questions of constitutional interpretation of the utmost importance are raised. As petitioner has already stated, in all the situations presented to this Court under the Act the interstate features of the industries were the dominant characteristic. But in the case at bar, the Board seeks to control an employer's relationship with production employees where the interstate feature touches only a small arc on the circumference of petitioner's business, and where the great preponderance is upon the side of intrastate or local organization.

The validity of the Board's extension of its authority to an industry so predominantly local, then, will be the chief subject of discussion in this brief. The only other question raised by petitioner concerns the interpretation of the Act itself, as to the nature of the consequences of labor practices upon commerce which will suffice to invoke the Federal authority.

Petitioner is not subject to the Labor Relations Board's jurisdiction because of labor practices concerning employees engaged in labeling, packing, storing and loading petitioner's canned goods.

Under the National Labor Relations Act the Board may assume jurisdiction only in those cases where Congress itself can act under the power to "regulate

commerce with foreign nations, and among the several states, and with the Indian tribes." (Constitution, Art. I, sec. 8.) The Act itself does not purport to confer jurisdiction upon the Board in terms any broader than the constitutional grant; control is restricted to questions and practices "affecting commerce".

It is extremely difficult in present day conditions to interpret a constitutional provision in the way in which it was intended by its framers, yet this is the task which must be performed if the Federal government is to be kept within the limitations imposed by the states. Our unique system of dual sovereignty is but one result of the jealousness of the states to maintain their independence, not only of foreign nations, but of one another. This attitude found its culmination in the Tenth Amendment—the states, not satisfied with the implied protections against a Federal encroachment, insisted upon a clear cut, black and white declaration. If a less individualistic philosophy of government is to be invoked, the authority for the change must come from the same source that imposed the restrictions in favor of the states. The constitutional pattern must be examined through the same glass under which it was designed.

In the stage of industrial development of 1787 it was undoubtedly taken for granted that manufacturing and production were matters of local concern. This Court has upon numerous occasions sustained the powers of the states as to such matters; the sphere of Federal influence has been restricted to commerce

in its traditional sense, which connotes intercourse. See *Gibbons v. Ogden,* 9 Wheat. 1, 189, 190.

An illustrative decision is the oft-cited case of *United Mine Workers v. Coronado Coal Co.,* 259 U. S. 344. Concerning interference with the mining of coal, this Court said (at p. 407):

> "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer v. Dagenhart,* 247 U. S. 251, 272, 62 L. Ed. 1101, 1106, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production a part thereof. *Delaware, L. & W. R. Co. v. Yurkonis,* 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. Rep. 902.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce."

Another case reaching a similar conclusion as to a production activity is *Oliver Iron Mining Company v. Lord,* 262 U. S. 172, wherein the Court discussed the validity of a Minnesota tax upon mining. The facts of the case will appear from the following quotation:

> "The chief contention is that mining, as conducted by the plaintiffs, if not actually a part of interstate commerce, is so closely connected therewith that to tax it is to burden or interfere with such commerce, which a State cannot do consist-

ently with the commerce clause of the Constitution of the United States.

"The facts on which the contention rests are as follows: The demand or market within the state for iron ore covers only a negligible percentage of what is mined by the plaintiffs. Practically all of their output is mined to fill existing contracts with consumers outside the state and passes at once into the channels of interstate commerce. Three-fourths of it is from open-pit mines and one-fourth from underground mines. At the open-pit mines empty cars are run from adjacent railroad yards into the mines and there loaded. Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey. The several steps follow in such succession that there is practical continuity of movement from the time the ore is severed from its natural bed. The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transportation is by public carriers. At the underground mines the plaintiffs dig the ore, bring it to the surface through shafts, and put it in elevated pockets where it readily can be loaded into cars. The subsequent movements are much the same as at the open-pit mines, but their continuity is not so pronounced. Some of the ore from both kinds of mines—between 10 and 20 per cent—is concentrated by washing or beneficiated after coming out of the mine and before starting out of the state; but our conclusion respecting the usual operations renders this deflection immaterial.

"Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing, is a local business, subject to local regulation and taxation. (Citing numerous cases.) Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce. (Citing numerous cases.)

"The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference." (262 U. S. at 177.)

And again, in *Coe v. Errol,* 116 U. S. 517, this Court laid down principles concerning production activities and interstate commerce which seem almost anticipatory of the case at bar. The town of Errol, New Hampshire, had imposed a general property tax upon certain logs which had been cut in New Hampshire. These logs were at the time in question being floated down the river to Lewiston, Maine, and were temporarily detained in the town of Errol, New Hampshire, on tax day by low water. The question which the Supreme Court had to decide was whether or not the logs which were then in New Hampshire, were subject to a general property tax of that state in the same manner as other property, even though the logs were intended for export. The court held that the

commerce clause did not prevent the state from levying such a tax. It stated that the logs, having been cut in New Hampshire, would be under the protection of the commerce clause as soon as they were put in the course of commercial transportation, by being delivered to a carrier for such purpose:

> "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving an an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State."
>
> * * * * * * *
>
> "Although intended for exportation, they may never be exported; the owner has a perfect right

> to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding." (116 U. S. 525, 526.)

The Court then recognized the difficulty of fixing a definite time for the commencement of interstate commerce, but stated general rules and gave examples which are in point here:

> "The point of time when state jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define; and yet it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question." (116 U. S. 526.)
>
> * * * * * * *
>
> "But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely: that such goods do not cease to be part of the general mass of property in the State, subject, as such to

its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many States there would be nothing but the lands and real estate to bear the taxes. Some of the western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 565 (77 U. S. bk. 19, L. ed. 1002): 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.'. But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. *The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation.* Until actually launched on its way to another State, or com-

> mitted to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. *Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether in fieri, and not at all a fixed and certain thing.*" (116 U. S. 528; italics ours.)

Other familiar decisions in the same vein are the following:

Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co., 249 U. S. 134;

United Leather Workers v. Herkert and Meisel Trunk Co., 265 U. S. 457;

Hammer v. Dagenhart, 247 U. S. 251;

Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837;

Carter v. Carter Coal Company, 298 U. S. 238, 80 L. Ed. 1160.

Because of the fact that production activities are considered traditionally as being intrastate in character, it might be thought at first blush that they were entirely removed from Federal control. But in exceptional circumstances this Court has recognized their intimate connection with interstate commerce and has upheld congressional dominion. With the increasing

complexity and magnitude of modern industrial organization this result may prove to be the rule rather than the exception.

When industries establish themselves upon a national basis with their trade covering a wide network of interstate channels, they may properly be considered as subjecting their production activities to a federal jurisdiction and control. The framers would no doubt have desired a control over a nationwide organization commensurate with its scope of operations.

But petitioner urges that as to a business which is predominantly local, the constitutional founders would have insisted upon state control, and the Tenth Amendment was but the expression of their desire to preserve for the states the authority over such affairs.

The Wagner Act decisions (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S....., 81 L. Ed. 563, 57 S. Ct. 615, and its companion cases) fully support this view. In the *Jones & Laughlin* case the corporation was organized in Pennsylvania to manufacture iron and steel; it owned subsidiary companies which gave it an integrated industry comprised of ore mines in Michigan and Minnesota, steamships upon the Great Lakes, coal mines in Pennsylvania, limestone properties in Pennsylvania and West Virginia, two railroads, warehouses in four states, fabricating shops in New York and Louisiana, sales offices in twenty cities in this country, a Canadian distribution agency; and seventy-five per cent of the product left Pennsylvania.

In the *Fruehauf* case (81 L. Ed. 582), the company operated in Michigan the largest trailer concern in the country. It had sales offices in twelve states, and a subsidiary operated a Canadian assembly plant and sales office. Over half the materials (in value) were received from other states, and eighty per cent of the product was sold out of Michigan.

In the *Friedman* case (81 L. Ed. 585) the company manufactured men's clothing in Richmond, Virginia. Of its principal materials (woolen and worsted goods), 99.57 per cent came from other states, and of the finished garments, 82.8 per cent were sold to out-of-state customers. A sales office was maintained in New York City, where 15 or 20 per cent of total sales were made.

In the *Washington, Virginia and Maryland Coach Company* case (81 L. Ed. 601) the company was admittedly an instrumentality of interstate commerce, being engaged in interstate transportation for hire.

In the *Associated Press* case (81 L. Ed. 603) the Press maintained offices scattered throughout the country for the collection and dissemination of news to its members for a profit to them.

Petitioner believes that the key to the problem is in the following quotation from the *Jones & Laughlin* decision (81 L. Ed. at page 575):

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from

> burdens and obstructions, Congress cannot be denied the power to exercise that control. *A. L. A. Schechter Poultry Corp. v. United States*, supra. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *The question is necessarily one of degree.*" (Italics ours.)

It will be noted that in the *Jones & Laughlin, Fruehauf* and *Friedman* cases there was a predominance of interstate features, not only as to purchases and sales of supplies and materials, but of the pattern of the industrial organization as well. In the case at bar, on the other hand, the purchases of supplies were entirely local and less than two-fifths of the product ultimately entered interstate commerce. Nor is petitioner organized on a plan extending its scope of operations beyond the State of California. The only place where it touches interstate channels is upon the sale of a small part of its product, by F. O. B. and C. I. F. contracts, under which petitioner loses all concern over this portion before it leaves the San Francisco Bay area. The employees handling this part of the product spend the greater part of their time and labor on goods consigned for intrastate trade, and no attempt to separate the local from the interstate is made until the warehouse operations involved here are concluded.

A very real danger lies in the application of the National Labor Relations Act to the case at bar. Although no statistics are available, it is obvious that a large portion, if not a majority, of the production industry of this nation is organized and functions on the same plan as petitioner's. Its plants are confined within a single state, and its commerce is essentially local in character. Only a minor (though probably substantial) part of it touches the interstate stream. Judge Wilbur recognized the threat to state sovereignty in the extension of Federal authority over such industries when he said (R. 125):

> "As the cases decided by the Supreme Court are not directly applicable because the facts differ, we turn to the reasoning by which the majority of the Supreme Court reached its conclusion to see if such reasoning is applicable or decisive herein.
>
> "Taken broadly the logic of this reasoning would justify the conclusion of my associates, but the majority of the Justices of the Supreme Court, as well as the minority, foresaw the danger that the opinion, pressed to its logical conclusion, might result in leaving to the sovereign states only the empty hull of government and admonished that in applying these decisions we must not only consider as a factor in the problem the direct effect upon interstate commerce of the collective bargaining system, but must also consider as a factor the authority of the state over its domestic concerns expressly and impliedly reserved by and to them by the Constitution."

Judge Wilbur then referred to the part of the *Jones & Laughlin* opinion above quoted (supra, p. 24).

This Court, realizing the dangers in a too generous application of the commerce clause, has often protected the purpose of the Tenth Amendment by curbing an over-reaching Federal control. The following from *Kidd v. Pearson*, 128 U. S. 1, 21, is illustrative:

> "If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. *The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.* . . . The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be local in all the details of their successful management." (Italics ours.)

Obviously, the line of demarcation between that which is Federal and that which is reserved to the states must be drawn somewhere. Petitioner believes that where production activities are concerned, the control should rest with the sovereign which is most concerned with them. If the interstate character is dominant, congressional authority should be applied;

if local features prevail, the states should be free to act. To hold otherwise is to whittle the state sovereignty away almost completely, and to yield before the dangers which the Tenth Amendment was expressly intended to forestall. To quote again from Judge Wilbur (R. 129-130):

> "In considering the relative rights of the state and federal governments it should be remembered that after the Revolution full sovereignty was vested in each of the original states subject to minor control by Congress under the Articles of Confederation and that the Federal government now has only such powers as were then granted to it by the states in the Constitution of 1787, and such as were granted by the amendments thereto. This, although historically clear, was made definite by the Tenth Amendment to the Constitution ratified in 1791 expressly reserving to the states, and to the people, all powers not given to the United States. Is it to be believed that full power would have been given to Congress over interstate and foreign commerce if it had been thought by those who formed the Constitution in 1787 and consented to its adoption at that time, that lying dormant within this general grant of power was a power to control practically every activity in a state if a small percentage of the product of this activity entered interstate or foreign commerce? The historical answer is clearly that such a provision so construed would not have been adopted."

If a line of limitation is to be drawn, it should be no more difficult to place it down the middle than at either end. The test of which is the dominant aspect

can, if anything, be applied easier than that of a small fractional amount as suggested in Judge Haney's opinion where he states that one per cent would satisfy the requirement (R. 121).

Petitioner believes that this case is controlled by the decision in *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160. This Court, in the *Jones & Laughlin* decision (81 L. Ed. 577), held that the *Carter* case was not controlling, but the opinions in the Circuit Court of Appeals in this proceeding expressly state that the *Carter* case is now overruled by the *Jones & Laughlin* decision (R. 108, 117).

The labor practices involved here did not have an effect upon commerce necessary to bring petitioner within the National Labor Relations Board's jurisdiction.

This question, if standing alone, might not be sufficient to support the petition herein, but it is one upon which petitioner believes the Circuit Court of Appeals erred, and is of great importance in the future application of the Act. It is a matter upon which no court has passed other than in this proceeding.

The testimony before the Board showed that the labor practices here involved had only an indirect repercussion upon interstate commerce in that petitioner's product was declared "hot" and members of certain other local unions refused to handle it (R. 196-197). Judge Denman recognized this in his opinion (R. 106, 107):

> *"The product of the plant was declared 'hot' and other locals of unions—teamsters, dock clerks, scalers, seamen, and longshoremen—failed or re-*

fused to handle it. Blacklisting of respondent's products was attempted." (Italics ours.)

"We hold that so far as concerns the manufacture and shipping activities of the respondent and its employees at the Oakland plant, the labor dispute leading to the discharge of the employees, the *declaration of the products as 'hot', and the sympathetic refusal of other unions to handle them, 'throttled' the flow of interstate commerce* and 'put in jeopardy' its future flow, to the extent of thirty-nine per cent of respondent's products manufactured to be shipped into that commerce."

However, the testimony further shows that this refusal to handle the "hot cargo" was in direct violation of an award made in October, 1934, by Judge Sloss acting as Federal arbiter in the San Francisco maritime strike of that year (R. 196-197). The so-called interference with interstate commerce was the intentional act of independent third persons, and it was wrongful in that it violated the award of a Federal arbiter.

The opinion of the Circuit Court of Appeals in holding that such acts constituted an effect upon interstate commerce raises serious questions as to the scope of the National Labor Relations Act which have not received other judicial consideration. If the Circuit Court of Appeals is correct in its ruling, it would follow that the threat of criminal action by third persons, such as arson or other destruction of property, would subject an employer to the Board's jurisdiction if such acts involved interstate or foreign commerce. Petitioner believes that the National Labor

Relations Act was intended to, and can only, be applied where the labor practice of an employer is one which in the ordinary course of labor activities would lead the employer to anticipate an interference with interstate commerce. An employer should not be required to expect that wrongful acts of persons with whom he has no dispute will tend to affect commerce.

CONCLUSION

It is therefore respectfully submitted that because of the great number of employers to whom the principles of this case will be applied, and because of the uncertainty which will follow in the absence of a pronouncement from this Court, the petition for writ of certiorari should be granted and the decree of the Circuit Court of Appeals reversed with instructions to deny the Board's application for enforcement of its order.

Respectfully submitted,

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Appendix

NATIONAL LABOR RELATIONS ACT

WAGNER-CONNERY LABOR ACT

Act of July 5, 1935, c. 372, 49 Stat. 449.

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Findings and policy.—Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market

for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of

their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Definitions. Sec. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 113 approved June 14, 1935.

National Labor Relations Board. Sec. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the

powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

Organization and administration. Sec. 4. (a) Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize

the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

Inquiries. Sec. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate,

prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Rules and regulations. Sec. 6 (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

Rights of employees. Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Unfair labor practices. Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 (a) an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

Representatives and elections. Sec. 9. (a) Representatives, designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall

have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the plead-

ings, testimony, and proceedings set forth in such transcript.

Prevention of unfair labor practices. Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which ap-

plication may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the

hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the

proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

Investigatory powers. Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts busi-

ness, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed or afore-

said shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

Penalty for resistance to Board's orders. Sec. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

Right to strike affirmed. Sec. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

Application of previous laws. Sec. 14. Wherever the application of the provisions of section 7(a) of the

National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707(a)), as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: Provided, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

Separability clause. Sec. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Title of Act. Sec. 16. This Act may be cited as the "National Labor Relations Act." *Approved July 5, 1935.*